Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

The law requires interexchange carriers ("IXCs") to interconnect with all providers of local exchange services and to compensate them for access services at their tariffed rates. The Commission should declare that self-help remedies of the kind used in recent months by IXCs, such as unilateral refusal to pay tariffed access charges and threats to block calls, are against the law and could result in major forfeitures. Commenters from diverse industry groups overwhelmingly support this interpretation of the law and supplement it with compelling public interest arguments.

Comments also show broad support for the proposition that the Commission should identify an appropriate set of benchmark rates and issue a declaratory ruling that all competitive local exchange carrier ("CLEC") access charges at or below those rates will be presumed to be just and reasonable, that CLECs will not be required to justify those rates with individual cost studies, and that the Commission will not entertain complaints alleging that such rates are too high. In these reply comments, ALTS presents a study by ICC Consulting demonstrating that a benchmark can appropriately be based upon mainstream access rates charged to IXCs by all incumbent local exchange carriers ("ILECs"). ICC calculates a benchmark based upon *overall* per-minute access charges, i.e., the total of all *nominal* per-minute access charges plus flat-rated presubscribed carrier interconnection charges, divided by each ILEC's total switched access minutes.

The Commission should clarify that, even when a CLEC is charging access rates above the benchmark, an aggrieved IXC's appropriate course of action is to file a complaint pursuant to section 208 of the Communications Act – not to engage in

unilateral disconnection or refusal to pay access charges. Until and if the Commission issues an affirmative determination to the contrary, a CLEC's filed rates are presumed to be just and reasonable.

Comments filed by representatives of diverse industry groups reveal that a broad consensus of parties share ALTS' view that it would be unwise and inappropriate for the Commission to consider adopting a "capacity-based" pricing structure for the switching component of exchange access services.

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The Association for Local Telecommunications Service ("ALTS"), by its attorneys, hereby submits these reply comments on the *Fifth Report and Order and Further Notice of Proposed Rulemaking* issued by the Federal Communications Commission's ("FCC" or "Commission") in the above-captioned proceeding.[1] ALTS is the major national trade association representing facilities-based competitive local exchange carriers ("CLECs").

I. INTRODUCTION

Comments filed in this proceeding by representatives of diverse industry groups overwhelmingly recognize that interexchange carriers ("IXCs") have an absolute obligation to maintain interconnection with all local exchange carriers ("LECs") and to compensate them for the provision of exchange access services at their tariffed rates. As

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[1] *Access Charge Reform,* CC Docket No. 96-98, *Fifth Report and Order and Further Notice of Proposed Rulemaking* (FCC 99-206, rel. Aug. 27, 1999) ("*Notice*").

discussed in detail below, it is against the law for IXCs to engage in unilateral self-help remedies such as denial of interconnection or refusal to pay lawfully tariffed rates for exchange access. If an IXC believes that a LEC's effective, tariffed access rates are too high, its remedy should be to file a complaint with the Commission pursuant to section 208 of the Communications Act. The Commission, not the IXC, is the entity that Congress has authorized to determine whether the rates involved are unreasonable and, if necessary, to prescribe different rates.

ALTS recognizes that the Commission has neither the inclination nor the administrative resources to engage in case-by-case evaluation of every IXC objection to CLEC access rates. In its comments, ALTS committed to provide a study that (a) would demonstrate that CLEC access charges in general are not unreasonable and do not need to be regulated, but (b), to the extent that the Commission deemed it useful to identify a "benchmark" for reasonable LEC access charges, would provide the Commission with a factual basis for establishing such a benchmark rate. That study, prepared by Integrated Communications Corp., is included with these reply comments as Attachment A ("the ICC study").

As ALTS indicated in its comments, the purpose of a benchmark is to establish a strong presumption that CLEC access charges at or below that level are reasonable and need not be justified by expensive and time-consuming cost studies. IXCs would be prohibited from denying interconnection with CLECs under any circumstances but would be free to file Section 208 complaints against CLECs charging access rates above the benchmark. Above-benchmark CLECs targeted by such complaints would have an opportunity to explain why their particular circumstances might justify above-benchmark

rates. The Commission would weigh the evidence and, if necessary, direct the CLECs to change their rates. In no event would IXCs be permitted to deny interconnection with any LEC. As ALTS discusses below, the record in the instant proceeding contains extensive support for ALTS' positions.

The record also shows that representatives of all industry groups participating in this proceeding share ALTS' view that the Commission should refrain from adopting a "capacity-based" pricing structure, for reasons discussed below.

II. THE COMMISSION SHOULD REAFFIRM THAT IXCS ARE REQUIRED TO MAINTAIN INTERCONNECTION WITH ALL CLECS AND TO PAY CLEC ACCESS CHARGES AT LAWFULLY FILED TARIFFED RATES

In its comments, ALTS explained in detail how IXCs are required to maintain interconnection with CLECs by sections 201, 202(a), 203(c), 214(a), 251(a)(1), and 254 of the Communications Act, and by Commission rules and policies implementing those provisions.[2] ALTS' position is shared by a diverse and broadly representative range of commenters:

- Among representatives of incumbent local exchange carriers ("ILECs"), ALTS' position is broadly supported by U S West,[3] USTA,[4] NTCA,[5] Alltel,[6] the National Rural Telecommunications Association,[7] and OPASTCO.[8]

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2 ALTS Comments at 16-27.

3 U S West Comments at 25-26 (section 251(a) makes clear that the public interest is best served if all carriers interconnect directly or indirectly with one another).

4 USTA Comments at 22 (sections 201(a) and 251(a) prohibit IXCs from unilaterally disrupting service to end users by simply refusing to pay originating or terminating access; the appropriate remedy if the IXC thinks rates are unreasonable is found in the section 208 complaint process).

- CLECs unanimously reject the proposition that IXCs may lawfully refuse interconnection with any carrier.[9]

- Among states, Alaska notes that it would be inconsistent with the Commission's competition policies to hold that IXCs must purchase access services from ILECs but not from CLECs.[10]

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[5] NTCA Comments at 5 (section 214 prohibits an IXC from discontinuing service in an area unless it has first obtained a certificate from the FCC allowing it to discontinue service).

[6] Alltel Comments at 6 (IXCs have a duty to interconnect with CLECs under Sections 201(a) and 251(a)).

[7] National Rural Telecommunications Assn. Comments at 5 (sections 251(a) and 201(a) require an IXC to interconnect with local exchange providers on request).

[8] OPASTCO Comments at 26 (network reliability and universal service would be harmed if IXCs were permitted to refuse the access services of any local carrier; section 63.71 of the Commission's Rules requires that IXCs file an application for discontinuance prior to withdrawing service from an area).

[9] Allegiance Comments at 5 (section 251(a) establishes that every telecommunications carrier has the duty to interconnect directly or indirectly with other carriers); Comments of CTSI at 7 (sections 201(a), 202(a), 251(a)(1), 251(b)(3) of the Communications Act and section 54.101 of the Commission's Rules require that IXCs deliver and accept traffic to and from all LECs on a nondiscriminatory basis); Comments of RCN at 6-8, 17 (section 201 requires carriers to furnish service upon reasonable request at just and reasonable rates; section 203(a) addresses the filing of rates; sections 254 and 251(a)(1) emphasize that carriers must interconnect with each other; sections 201, 202, 203, and 214 of the Act and section 63.71 of the Commission's Rules require IXCs to accept originating traffic from the carrier chosen by the IXC's customer); Comments of CCG at 3 (sections 201(a) and 251(a) require interconnection); Comments of MGC at 15, 17 (section 254(b)(3) requires that consumers in all regions of the nation should have access to telecom services, including interexchange services; an IXC's refusal to send and accept traffic from a CLEC violates section 201(a) and 251(a)(1)); Minnesota CLEC Consortium Comments at 3 (section 201(a) requires interconnection when requested); Winstar Comments at 6-7 (an IXC's refusal to interconnect violates sections 201(a), 202(a), 203, 214, 251(a), and 254); Teligent Comments at 3 (refusal to interconnect violates sections 201(a), 202(a), and 251(a)(1)); Rainier Cable Comments at 1 (interconnection required by sections 201(b) and 251(a)); Hyperion Comments at 15 (interconnection required by sections 201, 202(a), and 251(a)).

Beyond the legal arguments, an equally diverse cross-section of commenters agree that permitting unilateral disconnection or refusal to pay access charges by IXCs would have serious negative policy consequences: USTA says it would limit customer choice, create customer confusion, and reduce competition;[11] OPASTCO says network reliability and universal service would be harmed;[12] CTSI and CCG say it would have serious anti-competitive consequences by permitting IXCs to discriminate in favor of affiliated carriers or carriers with whom they have favorable contractual relationships;[13] McLeodUSA says it would have the effect of forcing nascent CLECs to negotiate customized access rates with every IXC in each jurisdiction where service is provided, with disastrous effects on transactional costs;[14] Hyperion says it would discriminate against the IXCs' own customers, by blocking their calls to customers of CLECs with whom the IXC refuses to interconnect.[15] In sum, an overwhelming preponderance of legal and policy arguments support the proposition that IXCs should not be allowed to withhold access payments unilaterally or to refuse interconnection with CLECs.

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10 Alaska Comments at 6-7 (Alaska supports the right of IXCs to refuse to purchase access service from both ILECs and CLECs).

11 USTA Comments at 22-23.

12 OPASTCO Comments at 3.

13 CTSI Comments at 9-10; CCG Comments at 4.

14 McLeodUSA Comments at 2.

15 Hyperion Comments at 15-16.

III. THE RECORD IN THE INSTANT PROCEEDING PROVIDES OVERWHELMING SUPPORT FOR CONTINUED FORBEARANCE FROM ACTIVE REGULATION OF CLEC ACCESS CHARGES

The comments in this proceeding demonstrate a consensus among representatives of diverse industry groups that invasive regulation of competitive carrier access charges is neither necessary nor desirable:

- ILECs broadly agree that additional regulation of CLECs is unnecessary, and that IXCs should not be permitted to discontinue interconnection with CLECs absent a specific finding of unreasonableness by the Commission.[16]

- A major IXC, MCI WorldCom, says there is no evidence that unreasonably high access charges are widespread and concludes that rate regulation of CLECs would be a step backward.[17]

- CLECs are unanimous in rejecting any need for further rate regulation of their industry.[18]

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[16] *See* USTA Comments at 26 (new regulations imposed on CLECs would be at best premature and at worst incongruous with the '96 Act); U S West Comments at 25 (Commission should not give IXCs free rein to refuse to deal with a CLEC that the IXC deems to be charging an excessive rate for terminating access; appropriate remedy is complaint process); GTE Comments at 49 (Commission should refrain from imposing new regulations on non-dominant carrier access charges absent strong evidence that such regulation is the only way to accomplish a clear public interest goal); BellSouth Comments at 9 (complaint process is the appropriate remedy for aggrieved interexchange carriers); SBC Comments at 4 (marketplace solutions, coupled with the complaint process, are the proper forums to determine if CLEC access rates are just and reasonable); Alltel Comments at 6 (IXC should file a complaint if it disagrees with CLEC rates).

[17] MCI WorldCom Comments at 18.

Proposals to address the "problem" of alleged CLEC overcharges by imposing mandatory detariffing on CLECs generated strong opposition among representatives of a similarly diverse range of industry groups, including ILECs,[19] IXCs,[20] and CLECs,[21] arguing that mandatory detariffing would impose substantial unnecessary transaction costs on CLECs, thrust them into one-sided negotiating sessions against powerful IXCs, and place them at a competitive disadvantage against ILECs, who would continue to be able to maintain tariffs.

This outpouring of concern by parties opposed to further regulation of CLECs comes in response to the Commission's statement that it "may have overestimated the ability of the marketplace to constrain CLEC access rates."[22] ALTS acknowledged in its

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18 *See, e.g.*, CoreComm Comments at 2; Cox Comments at 3; Winstar Comments at 3.

19 *See, e.g.*, Comments of Alltel at 7.

20 *See, e.g.*, AT&T Comments at 30 (mandatory detariffing would impose substantial, unnecessary burdens on both CLECS and their access customers by invariably requiring them to negotiate contractual access arrangements in lieu of tariffs).

21 Comments of CTSI at 17 (allowing ILECs advantage of filed rate doctrine while denying it to CLECs would be discriminatory); Comments of Rural Independent Competitive Alliance at 18 (mandatory detariffing would impair service in rural areas); Comments of RCN at 13 (presence of a tariff protects the CLEC and its customers against abusive pressures from monopolistic IXCs); Comments of Allegiance at 19 (mandatory detariffing would create a large imbalance in negotiating power in favor of IXCs); Comments of MGC at 14 (CLECs do not possess the market power to negotiate mutually acceptable agreement with large IXCs); Comments of CCG at 6 (requiring CLECs to negotiate individually with each IXC would create a prohibitively expensive and time consuming hurdle for new CLECs); Rainier Cable Comments at 2; Time Warner Telecom at 19; Hyperion at 21 (mandatory detariffing would increase IXC bargaining power and cause CLECs to incur significant unnecessary transaction costs); and McLeodUSA at 2-3.

22 *Access Charge Reform*, CC Docket No. 96-98, Fifth Report and Order and Further Notice of Proposed Rulemaking (FCC 99-206, rel. Aug. 27, 1999) ("*Notice*") at ¶238.

comments that a simplistic comparison of per-minute rates tariffed by CLECs and some ILECs can show significant discrepancies – a typical Tier 1 ILEC charges 1.5 to 2.5 cents per minute, while a typical CLEC may charge 4 to 5 cents.[23] ALTS added, however, that this analysis is misleadingly oversimplified because it fails to account for the non-usage-based charges that the ILECs impose on IXCs.

Historically, ILECs applied much higher per-minute access charges. Those charges are much lower today not because of ILEC rate reductions, which have been minimal, but because of ILEC rate *conversions*. The Tier 1 ILECs have begun recovering an increasing proportion of their costs by applying monthly, flat-rated charges to IXCs, referred to as presubscribed carrier interconnection charges ("PICCs"). The attached ICC study provides a more comprehensive view of ILECs' interstate switched access charges for originating and terminating traffic by including PICCs as well as nominal per-minute charges. To achieve an apples-to-apples comparison of access charges, ICC divides this aggregate total of ILEC access charges by the number of access minutes involved.[24] ICC performs a statistical analysis of the resulting rates to discern rate levels applied by mainstream ILECs.

Given the cost burdens that CLECs must carry compared with ILECs, it is remarkable that their rates for switched access services are anywhere near the ILEC rates.

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[23] The Commission has several times repeated the AT&T assertion that CLEC rates "in some cases" are more than twenty times those charged by the incumbent LECs against which the CLECs compete. Even when looking at only the per-minute charge, however, there is no proof that any CLEC charges anywhere near 20 times what the ILEC with which it competes charges. The one case that AT&T cites in its petition, that of Sharon Telephone, is factually inaccurate. Sharon Telephone is a small *ILEC* that does not compete with Ameritech.

The Commission itself extensively documented this point in its recently released *UNE Remand Order.*[25] On the basis of its own analysis, the Commission reaches the following conclusions:

- "Because incumbent LEC switches serve the majority of customers for local exchange service, they are likely to be able to take advantage of substantially greater economies of scale than the competitor would using its own switches."[26]
- "We find, as a general matter, that the total costs of self-provisioning a switch impose on the requesting carrier [i.e., the CLEC] a significant cost disadvantage relative to the incumbent LEC, particularly in its early stages of entry."[27]
- "[A] competitor's switching costs per minute at a 10% penetration level are slightly more than twice the cost of an incumbent LEC serving the remaining 90% of the market with its own switch."[28]

ICC's analysis further validates the Commission's conclusions with graphs and statistical measures showing that ILEC charges for switched interstate access charges are inversely related to the number of access lines served by the ILECs involved.

As ALTS noted in its comments, the Commission has long recognized the scale economies that carriers experience when providing switching,[29] as reflected in the so-

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24 ICC Study at ii.

25 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FCC 99-238, released Nov. 5, 1999) at ¶¶253-263.

26 *Id.* at ¶258.

27 *Id.* at ¶259.

28 *Id.* at ¶260.

called "Average Schedule" rates filed by the National Exchange Carrier Association ("NECA") and participated in by most of its members. On this basis, the principal NECA interstate access charge tariff contains seven rate bands for end office switching[30] and four rate bands for switched transport.[31] The Commission's longstanding recognition of the scale economies associated with switching is also reflected in cost allocation rules tied specifically to the number of access lines served by carriers, without regard to loop lengths involved.[32]

When evaluating CLEC access charges, it is perfectly reasonable to look at rates applied by similar-sized ILECs, including independent ILECs participating in NECA's average schedule tariffs. MCI WorldCom specifically acknowledges that NECA rates could provide a useful benchmark for the purpose of demonstrating whether CLEC access rates are unreasonable.[33]

A comparison between CLEC and NECA Average Schedule companies is especially apt for switching costs. While many NECA participants operate in rural areas,

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29 "The Commission has recognized that smaller telephone companies have higher local switching costs than larger incumbent local exchange carriers (ILECs) because the smaller companies cannot take advantage of certain economies of scale." *National Exchange Carrier Assn., Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 13 FCC Rcd 24225, 1998 FCC LEXIS 6539 (Dec. 22, 1998) at n. 6.

30 The rates shown for local switching range from 0.9 cents per minute to 2.4 cents per minute. *NECA Tariff F.C.C. No. 5,* §17.2.3, 25th Revised Page 17-11. The tariff lists the pertinent rate bands for each participating carrier. *Id.* at §17.5.1, 3rd Revised Page 17-43 *et seq.*

31 The per-minute rates shown for premium transport interconnection range from 0.5 cents per minute to 1.26 cents per minute. NECA Tariff F.C.C. No. 5, §17.2.2 at 3rd Revised Page 17-10.2.1.

32 *See* Section 47 C.F.R. Sec. 36.125(f).

33 MCI WorldCom Comments at 21.

the IXCs themselves recognize that there is no direct relationship between population density and switching costs. Almost without exception, they assert that there is no basis for establishing separate geographic rate zones for local switching and tandem switching, though most readily acknowledge that geographic rate zones for subscriber line charges ("SLCs") make perfect sense, because SLCs recover loop costs, and loop costs vary with population density.[34]

To the extent that CLEC access charges reflect non-traffic-sensitive rate elements, they can also be reasonably compared to NECA's Average Schedule. Most companies participating in NECA's Average Schedule tariffs have a large proportion of subscribers in rural areas, where loop costs are higher, but, as ICC points out, the average ILEC participating in NECA's tariffs receives $5.57 per month per access line in explicit federal universal service subsidies to compensate it for high cost loops.[35] *These payments are not reflected in per-minute access charges paid by IXCs to NECA Average Schedule companies.* Since January 1, 1998, these amounts have been collected and disbursed through federal Universal Service Fund mechanisms.[36] To the extent that per-minute interstate access charges help NECA participants recover loop costs, they only apply to the interstate allocation of whatever costs remain after accounting for the $5.57 per line subsidy.

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[34] AT&T Comments at 7; MCI WorldCom Comments at 3; Cable & Wireless Comments at 6-7. The exception is Sprint, which has a large local telephone division as well as an IXC. *See* Sprint Comments at 7-8.

[35] Attachment B, Memorandum from August H. Ankum, Senior Vice President, ICC, November 29, 1999.

[36] *See* 47 C.F.R. §36.601.

In contrast to NECA Average Schedule companies, CLECs have no means of recovering their loop costs other than to seek direct payments from their customers, including IXCs. It is true, of course, that most CLECs operate in densely populated urban areas, and that loop costs may vary considerably with population density. Even in urban areas, however, CLEC customers tend, on average, to be located at substantial distances from the CLEC's serving central offices. As explained in the ICC study,[37] competitive new entrants typically have a dispersed customer base, and efficient network design using the latest technologies requires a smaller number of switches served by longer transmission lines. CLECs hope someday to take advantage of their more efficient network designs as subscribership rises, but current penetration levels reflect higher network costs.

Contrary to the picture that AT&T and Sprint have sought to draw, the access charges applied by CLECs today do not reflect greed. They reflect a strenuous and largely successful effort to keep their access charges within the range of rates applied by mainstream ILECs. The real picture does not provide any basis for rate regulation of CLECs – or for unilateral discontinuance of interconnection by IXCs.

IV. THE COMMISSION SHOULD ADOPT A STRONG PRESUMPTION THAT CLEC ACCESS CHARGES AT OR BELOW A SPECIFIED BENCHMARK ARE JUST AND REASONABLE

ALTS does not believe that rate regulation of CLECs is necessary, but CLECs confront a practical difficulty: IXCs are unilaterally refusing to pay CLEC access charges and are even threatening to block calls originating with those CLECs. To simplify the

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[37] ICC Study at 9-10.

prosecution of CLEC complaints against those IXCs – and to prevent IXCs from filing groundless complaints against CLECs – ALTS commissioned the attached study by ICC to identify a basis for establishing a specified benchmark rate. Based on the ICC study, the Commission would be fully justified in establishing a strong presumption that CLEC access charges falling at or below the benchmark are reasonable. If the Commission decides to adopt such a presumption, it should couple it with assurances that CLECs that meet it will be guaranteed payment by IXCs and will be protected from meritless litigation and threats of unilateral service interruptions.

If an ILEC files a complaint against a CLEC that charges above-benchmark rates, the CLEC should have an opportunity to explain the particular circumstances that might, in its case, justify such rates. The Commission can order the CLEC to reduce its rates if the evidence justifies it. IXCs, however, have no authority to render or enforce such determinations on their own and should be severely penalized if they attempt to do so.

A. Initial Comments Demonstrate Broad-based Support for a Benchmark Approach to Evaluating CLEC Access Charges

As noted above, a broad consensus of commenters representing diverse industry groups maintain that it would be both unnecessary and unwise to apply *any* form of rate regulation to CLECs. Of the few parties that advocate CLEC rate regulation as the preferred alternative, none would require individual CLECs to conduct cost studies; instead, they advocate that the Commission establish benchmarks. These recommendations range from the reasonable – e.g., MCI WorldCom's observation that NECA rates might provide a useful benchmark for establishing a presumption of

reasonableness[38] – to the absurd, such as Sprint's proposal that all CLECs be required to charge the same rates as Regional Bell Operating Companies, regardless of their underlying cost characteristics.[39] Some parties advocate simply that some kind of benchmark be applied, without specifying what it should be.[40] Several CLECs argued that an appropriate benchmark for CLEC access rates would be rates charged by comparably-sized ILECs, such as the rates reflected in NECA's Average Schedule.[41] Other CLECs argued that CLEC access charges should be presumed reasonable if they fall within a specified percentage range of the rates charged by the local ILEC.[42]

ALTS members are generally willing to accept the adoption of a benchmark for determining the reasonabless of rates if, in return, they gain an assurance of continued interconnection with IXCs and reimbursement for access services provided, protection from groundless and harassing complaints, and exemption from any requirement to engage in expensive and time-consuming cost studies. ALTS took this position in its comments and reaffirms it in this reply.[43]

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38 MCI WorldCom Comments at 21-22.

39 Sprint Comments at 21-22.

40 Cable & Wireless Comments at 3; Comptel Comments at 2-3.

41 CTSI Comments at 19; McLeodUSA Comments at 4. *See also* Comments of Rural Independent Competitive Alliance at 20 (for CLECs owned by rural ILECs, benchmark should be access rates charged by the rural ILEC parent); Comments of Minnesota CLEC Consortium at 16 (benchmark should be rates charged by rural ILEC parent of CLEC if CLEC is affiliated with an ILEC; otherwise the benchmark should be rates charged by ILECs similar in size to the CLEC).

42 Hyperion Comments at 12 (CLEC rate should be presumed reasonable if within 25 percent of the local ILEC's rate, assuming the ILEC rate is adjusted to account for the PICC); RCN Comments at 14-15 (CLEC rate should be presumed reasonable if within 20-30% of the local ILEC's rate).

43 ALTS Comments at 9-30.

Based on the fact that market forces alone have already proven more than adequate to restrain CLEC access rates, ALTS believes that the Commission can safely rely on a minimalist approach to benchmarks requiring reference to only one number.[44] The ICC study shows that a CLEC could charge as much as 5.8 cents per minute for access and still fall within one standard deviation of the charges applied by ILECs as a group.[45] At or below those levels, a CLEC would be within the main stream of rates charged by ILECs, and the Commission should presume that its rates are reasonable.

Market forces will prevent CLECs from raising their rates if the Commission adopts 5.8 cents per minute as a benchmark rate. The Commission can monitor the market to ensure that that prediction is fulfilled. If ALTS' expectations prove mistaken and CLECs raise their access rates, the Commission can consider adopting a more detailed benchmarking method comparable to NECA's Average Schedule. Such detailed regulation would be premature at this time, however, and, in any case, the record is insufficient to provide a basis for promulgating any kind of detailed regulatory scheme for CLECs. ALTS believes that the Commission will never feel compelled to adopt such a scheme.

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[44] *See also* MGC Comments at 26 and Allegiance Comments at 11-12 (supporting ALTS' approach).

[45] ICC Study at ii. ICC finds that there is a slight difference between the rates that ILECs typically charge for originating access and terminating access, but, since the same kinds of facilities are involved, there may be no cost-based reason to apply different rates to them. Thus, it would be reasonable for the Commission to establish the same benchmark for terminating and originating access.

B. The Commission Should Take Steps to Protect CLECs from Unreasonable Refusals to Pay and Vexatious Litigation

Under existing Commission rules, all rates filed by CLECs are presumed lawful unless they are suspended and set for investigation by the Commission.[46] The Commission has recently extended this treatment to certain ILEC services, allowing ILECs to offer volume and term discounts and to offer contract tariffs on one day's notice without any required cost justification.[47] The Commission justified its decision to streamline ILEC contract tariffs on the ground that market forces and the section 208 complaint process provide an adequate avenue of relief for parties aggrieved by ILEC ratemaking practices.[48]

Having reached that conclusion so recently with respect to ILECs, with their mammoth customer bases, cash reserves, and monopoly legacies, the Commission could not justify a belated effort to impose rate regulation on CLECs. As Time Warner notes in its comments, a Commission decision to regulate CLEC rates in this proceeding would compel it to reverse its prior decisions to deregulate ILEC rates, to prevent an appeals

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46 The Commission may later prescribe a change in those rates pursuant to Section 205, and such rates may be challenged in a complaint filed pursuant to Section 208, but the Commission may only change the rates on a going-forward basis. The Commission has interpreted a provision of the Telecommunications Act of 1996 as having taken away its authority to order retroactive rate changes or damage awards. *See Implementation of Section 402(B)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 (1997), at ¶¶8, 18, and 20-21.

47 *See Notice* at ¶¶123 and 128.

48 "Intermedia's concerns about a potential price squeeze are best addressed in the context of a complaint filed under section 208 . . . ." *Notice* at ¶131.

court from reaching the unavoidable conclusion that the Commission was acting arbitrarily and capriciously.[49]

In the meantime, however, CLECs are being exposed to unlawful unilateral refusals to pay by IXCs and to outright threats to refuse interconnection. Sprint, for example, states that as of September 1999 it had outstanding disputes with more than two dozen CLECs and that the list is growing by two or three CLECs every month.[50] One CLEC, MGC, was recently able to obtain a favorable Commission ruling against AT&T,[51] but a month later AT&T filed a tariff revision that states, "In the absence of access arrangements between the Company [AT&T] and the access provider at a particular Station, a Customer may be unable to place calls from or to the affected Station."[52] With that tariff filing, AT&T renewed its threats to refuse interconnection with CLECs.

The record in this proceeding demonstrates considerable concern among CLECs that they are being, or may be, subjected to refusals by IXCs to pay lawful access charges. McLeodUSA, for example, foresees the possibility that IXCs could refuse to interconnect with certain CLECs and might reinforce those decisions by blocking calls made by the IXCs' customers to customers of certain CLECs.[53] Even if the IXC

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49 Time Warner Comments at 14 n. 16.

50 Sprint Comments at 15-16. Sprint adds that the total amount in dispute as of September was $15.5 million and was growing at the rate of $2.3 million per month. *Id.*

51 *See MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002, DA 99-1395 (rel. Jul. 16, 1999) ("*MGC v. AT&T*").

52 AT&T Tariff F.C.C. No. 1, 16th Revised Page 21, effective Aug. 20, 1999, at §2.1.6.A(2).

53 McLeodUSA Comments at 2.

maintains interconnection while withholding access charge payments to CLECs, the effect can be extremely harmful, especially upon smaller CLECs and new entrants. For CLECs to obtain payment, they must often incur delays and legal costs associated with prosecuting complaints or lawsuits. IXCs have so far refused to follow the procedures called for in existing Commission rules, i.e., to continue paying while pressing a section 208 complaint against the CLEC involved. Against that backdrop, ALTS considers it a vital necessity that the Commission provide immediate, comprehensive relief to CLECs by spelling out the terms and conditions under which IXCs will be required to interconnect with CLECs and to compensate them for originating and terminating access service.

ALTS proposes that the Commission issue a declaratory ruling that CLECs with rates at or below the benchmark recommended by ALTS need not go through a formal complaint process to perfect their rights to maintain interconnections with IXCs and to collect access charges from them. The Commission should declare that, if a CLEC's access charges are set at or below the benchmark rates, a refusal by an IXC to pay such rates will be deemed unreasonable, and that a formal complaint demanding payment for the withheld amounts, plus interest, will be resolved in the CLEC's favor. This will obviate the need for CLECs to file formal complaints to oppose "self-help" by IXCs, and will allow them to proceed directly to court to seek payment.

The Commission should also reaffirm that it rejects self-help remedies under any circumstances, even when CLECs set rates above the benchmark. The appropriate remedy for IXCs aggrieved by such rates should be to pursue a section 208 complaint

but, in the meantime, continue to maintain interconnection and pay the CLEC's access charges.

At the same time, the Commission should take action to protect CLECs from vexatious, meritless, and harassing complaints by IXCs. Large carriers with extremely deep pockets have the ability and incentive to subject CLECs to vexatious complaints, and could use such complaints to punish selected CLECs in order to intimidate others. At a minimum, the Commission should establish a very high hurdle for complainants, comparable to the criteria that it applies to similar complaints against ILEC price capped tariffs.[54]

The Commission can also limit the frequency of such unreasonable conduct by declaring that it will not accept complaints from IXCs if the complaining carrier is acting in an unreasonably discriminatory manner. Specifically, the Commission should establish a threshold analysis to test for discriminatory complaints, to determine if the IXC is paying access charges to other similarly situated LECs that are as high, or higher than, the rates against which the complaint is directed. The complaining party should be required to make the following showings:

- First, the complaining party must identify all LEC affiliates, subsidiaries, or strategic partners that set access rates at or above the rates of the CLEC that are the subject of the complaint.

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[54] Price cap carriers offering within-band rates are not required to supplement their original rate filings unless a complainant provides information such as persuasive evidence of several rate increases in succession for a particular service, discriminatorily high increases for certain services, or precipitous decreases having anti-competitive

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- Second, the complainant must state whether or not it is paying access charges of other carriers that are set at or above the rates that are the subject of the complaint; the complainant must identify all such carriers and state whether it has also filed a similar complaint against such other carriers.

The Commission should consider this information in determining whether the complaining party has made a prima facie case adequate to support a section 208 complaint,[55] and should place a heavy burden on the complainant to show that its complaint is not discriminating or vexatious. These criteria should apply whether or not the CLEC's access charges are at or below the benchmark. Any complaint that does not contain this information should be dismissed as incomplete.

C. The Commission Should Endorse the Analytical Method for Identifying a Range of Reasonableness for CLEC Access Charges Established in the ICC Study Commissioned by ALTS

The purpose of the attached ICC study is to provide the Commission with a canary in a coal mine, not to provide the Commission with a basis for imposing a detailed rate regulatory scheme upon CLECs like the NECA Average Schedule tariffs. Coal miners traditionally kept canaries close at hand because they would faint or die at the first

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effect. *Policy and Rules Concerning Rates for Dominant Carriers,* 5 FCC Rcd 6786 (1990) at ¶294, n. 379. *See also AT&T Price Cap Order*, 4 FCC Rcd at 3099-3100, ¶458.

[55] *See* 47 C.F.R. §1.728 (any document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed); §1.721 (complaint must include a complete statement of facts which, if proven true, would constitute a violation); and §1.720 (pleadings in a complaint proceeding must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation).

whiff of hazardous, potentially explosive gases. The benchmarks identified by ICC can perform a similar function by providing the Commission with reasonable assurance that market forces are keeping the vast majority of CLECs within the main stream of rates charged by ILECs.[56]

ICC studied 1,435 ILEC tariffs in an effort to understand the range of switched access charge levels that an IXC might encounter when originating or terminating long distance service. ICC groups all of the ILECs involved into three categories: (a) Bell operating companies ("BOCs"), GTE, and Sprint; (b) companies participating in NECA Average Schedule tariffs; and (c) independent companies that do not participate in NECA's Average Schedule.

The switched access rate compilation in the ICC study includes the usage sensitive rate elements paid by IXCs for connecting at the ILEC tandem and using the ILEC's shared transport services. Also included are flat-rated PICC charges. ICC converted PICCs to per-minute-of-use ("MOU") charges so that, for each ILEC, a total composite per-MOU interstate switched access rate could be established. By constructing a composite per MOU rate for each ILEC, the study provides a more complete picture of the prices paid by IXCs for originating and terminating their interstate traffic on ILEC networks. As noted above, ICC did not include in its calculations the $5.57 per line monthly subsidies that NECA average schedule companies

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[56] The benchmark proposed here may sometimes draw the Commission's attention to CLECs whose rates are perfectly reasonable and can easily be justified, even though they may be above the benchmark. While rates below the benchmark should be presumed reasonable, this does not imply that rates above the benchmark should be presumed to be unreasonable.

receive from the federal Universal Service Fund ("USF") to compensate them for high-cost local loops.[57] With USF revenues excluded, the ICC analysis is inherently conservative; if ICC had included USF revenues in its analysis, it would have arrived at a much higher number for overall per-minute access revenues for NECA average schedule companies.

Having established the actual per-MOU prices charged by ILECs to IXCs as the proper basis of comparison with CLEC switched access rates, ICC studied the distribution of existing ILEC rates. Notably, despite the recommendations of MCI WorldCom and others cited above that NECA's Average Schedule rates could serve as an appropriate benchmark for CLECs,[58] ICC identifies an appropriate benchmark by looking at the rates charged by *all* ILECs – including the rates charged by Tier 1 price-capped ILECs.

ICC discovered, first of all, that despite intensive regulation over the course of many decades, there is significant variation among the tariffed interstate access rates of the 1,435 ILECs studied. Rates range from a low of $0.009 per MOU to a high of $0.189 per MOU. For originating access, the average rate per MOU for all 1,435 ILECs was $0.0419; the mean rate plus one standard deviation was $0.0544. For terminating access,

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[57] Nor does the ICC study include all of the access charge payments made by IXCs to ILECs. Many IXCs obtain the use of ILEC entrance facilities through complex, non-tariffed billing arrangements that would be difficult or impossible to document from publicly accessible sources; these charges are not included in the ICC analysis even though interconnecting with CLECs rarely requires an IXC to make any incremental expenditures for entrance facilities. *See Transport Rate Structure and Pricing Resale, Shared Use and Split Billing*, CC Docket No. 91-213, Report and Order, 13 FCC Rcd 6332 at ¶¶1, 6 and 16.

[58] *See* note 33, *supra*.

the average rate per MOU was $0.0443; the mean plus one standard deviation was $0.0577. Given the substantial degree of variation in the rates reported, ICC concluded that $0.058 per MOU could be used as a reasonable benchmark for CLECs' interstate switched access rates.[59]

As ICC explains, the standard deviation is commonly used to characterize data points falling within the main stream of a statistical sample. In this case, ILECs with access charges 30 percent higher than the average are within one standard deviation of the norm. By comparison, the Commission recently decided to provide supplemental federal support to non-rural ILECs in states with projected costs that exceed the national average by 35 percent.[60]

It is likely that CLECs in some circumstances will experience costs that are more than 30 percent above the national average, and, if challenged by complaints, they should be given the opportunity to explain those costs and justify their rates in appropriate Commission proceedings. The Commission's own analysis of switching costs and scale economies in the *UNE Remand Order*[61] amply illustrates the kinds of circumstances that could support such rates.

To minimize administrative burdens, the Commission can safely use the ICC benchmark as a reference point for a declaratory ruling that it will rule in favor of any

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[59] As noted above, there may be no cost basis for establishing different benchmarks for originating and terminating access, because the same facilities are involved.

[60] *Federal-State Joint Board on Universal Service, CC Docket No. 96-45*, Ninth Report & Order and Eighteenth Order on Reconsideration (FCC 99-306, rel. Nov. 2, 1999) at ¶¶10, 45,-46, and 53-56.

[61] *See* discussion on page 9, *supra.*

CLEC that files a complaint against an IXC demonstrating that the CLEC's access charges are at or below the benchmark and that the IXC is either blocking calls or has failed to pay the CLEC's tariffed access charges.[62] The benchmark can also be used as a screening device to reject meritless and harassing complaints filed by IXCs against CLECs.

As ALTS noted in its comments, the Commission has long since abandoned the notion that every regulated carrier should be required to justify its rates under every circumstance. The Commission has lightened the burden of regulation on private parties, and vastly simplified its own administrative processes, by adopting rules of thumb – benchmarks and bellweather companies – and accepting rates falling within ranges generally assumed to be reasonable. Examples include international telephone settlements rates,[63] cable television rates,[64] rates charged to interexchange carriers by

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62 The Commission should declare that a ruling in the CLEC's favor will be granted automatically within a specific number of days if the IXC does not file an opposition challenging the factual accuracy of the CLEC's allegations. Otherwise, the Commission should limit its analysis to a factual determination of whether or not the CLEC is charging within-benchmark rates and whether or not the IXC is maintaining interconnection and making timely payment of the CLEC's lawfully filed access charge tariffs.

63 *International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997), aff'd sub. nom., *Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir., Jan. 12, 1999) ("International Benchmarks Order").

64 *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5768-69, 5770-74, 5777-78, 5881-83 (1993) ("*Cable Rates Order*"), *recon.*, 9 FCC Rcd 1164, 1171-79 (1993); 47 C.F.R. §76.956(b). Since the cable benchmark methodology is based in part on industry-wide data, it does not necessarily reflect individual systems' costs of providing cable service. The Commission concluded that the benchmark methodology may not permit all cable operators to fully recover the costs of providing service and to continue to attract capital. Consequently, the Commission decided to allow cable operators to exceed the rate level permitted under the

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local exchange carriers that participate in tariffs based on industry average costs,[65] and annual productivity improvement factors applied to price caps for larger local exchange carriers.[66] The approach that ALTS proposes herein is fully consistent with these established precedents.

V. THE COMMISSION SHOULD NOT ADOPT CAPACITY-BASED LOCAL SWITCHING RATES

In its comments, ALTS argued that adoption of a "capacity-based" pricing structure for access charges that recover the cost of local switching would be a radical, unnecessary, and undesirable departure from established Commission precedents.[67] Nearly all of the ILEC representatives who addressed this issue shared ALTS' position.[68] USTA attached an extensive analysis by Dr. William Taylor explaining why a capacity-based rate structure would be economically unsound.[69] IXCs, including all of the largest ones, also opposed any attempt to adopt a capacity-based pricing structure.[70]

As ALTS noted in its comments, the Commission's proposal cuts against the long-running trend of Commission decisions moving away from attempts to link rates to

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benchmark methodology, provided that they could make the requisite cost showings demonstrating that the rate in question was reasonable even though it exceeded the permitted benchmark level. *Cable Rates Order*, 8 FCC Rcd at 5794.

65 47 C.F.R. §69.606(a). For background, *see National Exchange Carrier Association, Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas,* 14 FCC Rcd 4049 (1999).

66 47 C.F.R. §61.44(b).

67 ALTS Comments at 30-33.

68 U S West Comments at 8-14; USTA Comments at 6-11; GTE Comments at 27-29; BellSouth Comments at 8.

69 USTA Comments, Attachment at 6-11.

costs on a service-by-service basis. The price cap rules largely break that connection and rely instead on market forces and regulations designed to mimic the effect of market forces. Of even greater practical significance, states and companies regulated by them have invested enormous amounts of effort to develop unbundled network interconnection rates, resale rates, and reciprocal compensation rates. Most of them assert that they have attempted to follow the Commission's guidance on these issues, even during intervals when the Commission's pricing rules were stayed or vacated by the Eighth Circuit Court of Appeals. In sum, both practical considerations and sound economics should lead the Commission to reject attempts to develop a capacity-based pricing pricing structure.

CONCLUSION

For all the foregoing reasons, ALTS respectfully recommends that the Commission issue a declaratory ruling that IXCs are required to maintain interconnection with all CLECs and pay CLEC access charges at their lawfully filed tariffed rates. In addition, the Commission should adopt a strong presumption that CLEC access charges at or below a benchmark rate of 5.8 cents per minute are just and reasonable. The Commission should declare that it will apply major forfeitures to IXCs that attempt to engage in self-help remedies such as unilateral refusal to pay lawfully tariffed CLEC access charges or unilateral efforts to block calls originating or terminating on CLEC networks. The declaratory ruling should make clear that CLECs with access rates at or below the benchmark need not go through a formal complaint process to obtain enforcement of those rights, but will be entitled to proceed directly to federal district

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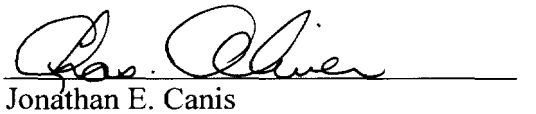
[70] AT&T Comments at 12; Sprint Comments at 10; MCI WorldCom Comments at 10-11; Cable & Wireless Comments at 5-6.

courts on the basis of the Commission's blanket affirmation that all CLECs operating within the benchmark are entitled to such relief. If a CLEC is charging access rates above the benchmark, the Commission should reaffirm that the proper procedure for aggrieved IXCs is not to unilaterally refuse payment or discontinue service, but to continue paying the tariffed rate and file a complaint with the Commission pursuant to section 208 of the Communications Act. The Commission should not adopt a capacity-based pricing structure for access charges.

Respectfully submitted,

THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

By: 

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November 29, 1999

CERTIFICATION OF SERVICE

I hereby certify that I have, this 29th day of November, 1999, served this day a copy of the foregoing REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES via hand delivery, to the following:

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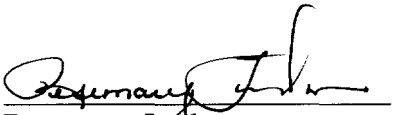

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